INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	4
Constitutional Provisions and Statutes Involved	5
Statement of the Case	6
Argument	10
Conclusion	21
Appendix "A"—Order of Court of Appeals Below, filed June 28, 1971, Denying Petitioner's Application to Proceed on Appeal In Forma Pauperis	23
Appendix "B"—Notice of Petition for Writ of Certiorari, filed in this Court	24
Appendix "C"—Petition for Re-Hearing, filed with Court of Appeals Below by Petitioner	25
Appendix "D"—Supplement to Petition for Re-Hearing, filed with Court of Appeals Below by Petitioner	29

Authorities

CASES:

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936)	18
Bennett v. *City of LaGrange*, 153 Ga. 428 (1922)	10
Deal v. *Cincinnati Board of Education*, 402 U.S. 962, 91 S.Ct. 1630, 29 L.Ed. 2d 128 (1971)	3
Department of Banking v. *Pink*, 317 U.S. 264, 268, 63 S.Ct. 233, 87 L.Ed. 254 (1942)	2

PAGE

Everson v. *Board of Education,* 330 U.S. 1, 18, 67 S.Ct. 504, 91 L.Ed. 711 (1947) 11

Ex parte Mitsuye Endo, 323 U.S. 283, 299, 65 S.Ct. 208, 89 L.Ed. 243 (1945) 18

Fed. Trade Comm. v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 211, 73 S.Ct. 245, 97 L.Ed. 245 (1952) 3

Follett v. *Town of McCormick, S.C.,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed 938 (1944) 12

Gillette v. *United States,* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed. 2d 168 (1971) 17

Gonzales v. *Roman Catholic Archbishops of Manila,* 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929) 12

Hull v. *State,* 120 Ind. 153, 22 N.E. 117 (1889) 10

Kedroff v. *St. Nicholas Cathedral,* 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952) 14

Kreshik v. *St. Nicholas Cathedral,* 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed. 2d 1140 (1960) 14

Lemon v. *Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971) 17

Murdock v. *Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) 12

Presbyterian Ch. v. *Mary E. B. Hull Mem.,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658 (1969) 14

Prince v. *Massachusetts,* 321 U.S. 158, 174, 64 S.Ct. 438, 88 L.Ed. 645 (1943) 10

Rector of Holy Trinity Church v. *United States,* 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892) 18

Salvation Army v. *United States,* 138 F. Supp. 914 (S.D.N.Y. 1956) 10

Schact v. *United States,* 398 U.S. 58, 63-5, 90 S.Ct. 1555, 26 L.Ed. 2d 44 (1970) 3

PAGE

Sherbert v. *Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963) 12

Suggs v. *Hendrix*, 142 F.2d 740, 743 (5th Cir. 1944) 18

Teague v. *Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968), cert.den., 394 U.S. 977, 89 S.Ct. 1457, 22 L.Ed. 2d 756 (1969) 3

Thomas v. *Collins*, 323 U.S. 516, 530-1, 65 S.Ct. 315, 89 L.Ed. 430 (1945) 12

Tilton v. *Richardson*, 403 U.S. 672, 685, 91 S.Ct. 2091, 29 L.Ed. 2d 790 (1971) 16, 17

Walz v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697 (1970) 16

Watson v. *Jones*, 80 U.S. (13 Wall.) 679, 20 L.Ed 666 (1871) 12

Constitutional Provisions

United States Constitution:

First Amendment 5

Statutes

28 *U.S.C.* § 1254 (1) 2, 5

28 *U.S.C.* § 2101 (c) 2, 3, 4, 5

Title VII of the Civil Rights Act of 1964, 42 *U.S.C.* §§ 2000e-2000e-15:

42 *U.S.C.* § 2000e (f) 8

42 *U.S.C.* § 2000e-2(a)(1) 17

42 *U.S.C.* § 2000e-8(a) 17

42 *U.S.C.* § 2000e-9(a) 17

The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 92d Cong. (March 24, 1972) 17

Other Authorities

PAGE

32 *Am. Jur.* 2d "Federal Practice and Procedure" § 285 p. 751 n.3 (1967) 4

9 Moore's *Federal Practice* ¶ 201.03 [2-2], p. 513 (2d Ed. 1970) 4

Rules of the United States Supreme Court, Rule 22 (4) 2

Rules of the United States Supreme Court, Rule 53 (1) 20

The Salvation Army Handbook of Doctrine 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Case No. 72-134

MRS. BILLIE MCCLURE,
Plaintiff-Petitioner,

v.

THE SALVATION ARMY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Citations to Opinions Below

The Opinion (Petition Appendix A 1a-8a, hereafter referred to as "Pet. App. A") by the United States District Court for the Northern District of Georgia dismissing the complaint on jurisdictional grounds is reported at 323 F.Supp. 1100 (N. D. Ga. 1971). The opinion (Pet. App. A 9a-25a) of the United States Court of Appeals for the Fifth Circuit, affirming the judgment (Pet. App. A 29a) of the District Court, is not yet reported. The order (Pet. App. A 26a-28a) of the District Court, dated January 13, 1971, denying Petitioner's application for a free transcript is re-

ported at 51 F. R. D. 215 (N. D. Ga. 1971). The order (Pet. App. A 30a-31a) of the District Court, dated May 11, 1971, denying Petitioner's application to proceed *in forma pauperis,* was appealed to the Court of Appeals. The order of the Court of Appeals, filed June 28, 1971, denying the application, but allowing Petitioner to proceed on appeal on the original typewritten record and typewritten briefs, is attached hereto as Respondent's Appendix "A".

Jurisdiction

Respondent strongly contends that this Court is without authority to grant a writ of certiorari in the instant case since the untimely filing of the petition deprives the Court of jurisdiction under the statutory requirements of 28 *U.S.C.* §§ 1254 (1) and 2101 (c). The original opinion and judgment (Pet. App. A 32a-33a) of the Court of Appeals was filed on March 17, 1972. Under the provisions of 28 *U.S.C.* § 2101 (c), a writ of certiorari has to be "taken or applied for within ninety days after the entry of such judgment or decree," which in the instant case would have fallen on June 15, 1972. The petition for a writ of certiorari was actually docketed in this Court on July 24, 1972, as shown by the Notice of Petition for Writ of Certiorari attached hereto as Respondent's Appendix "B", thirty-nine (39) days after the expiration of the statutory deadline. No application for an extension of time within which to file the petition for writ of certiorari was made by Petitioner under 28 *U.S.C.* § 2101 (c) and Rule 22 (4) of this Court. Where, as here, the time for filing a petition is established by an act of Congress rather than a rule of this Court, such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for this Court to waive the untimeliness or to entertain the petition. As stated in *Department of Banking* v. *Pink,* 317 U.S. 264, 268, 63 S. Ct.

233, 87 L. Ed. 254 (1942), such a petition "must . . . be denied for want of jurisdiction". See also *Teague* v. *Commissioner of Customs,* 404 F.2d 441 (2d Cir. 1968), cert. den., 394 U.S. 977, 89 S. Ct. 1457, 22 L.Ed. 756 (1969). In *Schact* v. *United States,* 398 U.S. 58, 63-65, 90 S. Ct. 1555, 26 L.Ed. 2d 44 (1970), this Court recently indicated that a waiver of untimeliness can be made only where a rule of this Court, rather than a statute, establishes the time requirement. The Court has strictly followed the statutory limits of 28 *U.S.C.* §2101 (c). See *Deal* v. *Cincinnati Board of Education,* 402 U.S. 962, 91 S. Ct. 1630, 29 L. Ed. 2d 128 (1971).

Petitioner will undoubtedly argue that her filing of a petition for re-hearing with the Court of Appeals below tolled the ninety-day limitation period set forth in 28 *U.S.C.* §2101 (c). Petitioner did file a petition for re-hearing, which is attached hereto as Respondent's Appendix "C", with the Fifth Circuit on March 28, 1972, but this petition for re-hearing was specifically limited to a request that the Fifth Circuit ". . . amend its judgment to provide for reversal of so much of the judgment of the District Court as assesses costs against the Appellant-Plaintiff." A supplement to the petition for re-hearing, which is attached hereto as Respondent's Appendix "D", was filed on April 6, 1972, in which Petitioner again sought *only relief* pertaining to court costs and the payment of docket fees and transcript costs. The April 26, 1972 order (Pet. App. A 34a) entered by the Court of Appeals in no way affected any matter of substance contained in its opinion and judgment dated March 17, 1972, which opinion analyzed in great depth the provisions of Title VII of the Civil Rights Act of 1964 (42 *U.S.C.* §§ 2000e-2000e-15) and the Religion Clauses of the First Amendment. In this regard, it is clear that the filing of the petition for re-hearing with the Fifth Circuit did not constitute an extension of the timeliness requirement. In *Fed. Trade Comm.* v. *Minneapolis-Honeywell*

Regulator Co., 344 U.S. 206, 211-12, 73 S. Ct. 245, 97 L. Ed. 245 (1952), this Court has stated that ". . . the mere fact that a judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought." The Court of Appeals in issuing its April 26, 1972 order on the petition for re-hearing did not amend or change any material ruling or any matters of substance contained in its original March 17, 1972 opinion which would in any way toll the ninety day requirement of 28 *U.S.C.* § 2101 (c). See 9 Moore's *Fed. Practice* ¶ 201.03 [2-2] p. 513 (2d Ed. 1970); 32 *Am. Jur.* 2d "Federal Practice and Procedure" § 285, p. 751 n.3 (1967). Respondent therefore respectfully submits that the petition for writ of certiorari was not filed in a timely manner in order to grant jurisdiction to this Court, and that this Court should not entertain the petition. Respondent alternatively submits that the petition for re-hearing filed with the Court of Appeals preserved for consideration by this Court only those issues raised in such petition for re-hearing, which issues of *in forma pauperis* status, the providing of a free transcript, and court costs clearly do not justify the granting of a writ by this Court, as discussed more fully in the Argument portion of this Brief.

Questions Presented

The Statement of Questions Presented as enumerated in the petition contains unnecessary and confusing detail. Respondent submits the following questions as a more accurate listing of the issues now before this Court.

I. Does the application of the provisions of Title VII of the Civil Rights Act of 1964 to the relationship between The Salvation Army and Mrs. McClure (a church and its

minister) violate either of the Religion Clauses of the First Amendment?

II. Was the Court of Appeals correct in interpreting Title VII of the Civil Rights Act of 1964 in a manner which upheld its constitutionality?

III. Do Mrs. McClure's claims concerning her *in forma pauperis* status, her demands for a free transcript and her contentions concerning court costs—the only issues raised in the petition for re-hearing in the Court of Appeals—justify the granting of a writ in the instant case?

Constitutional Provisions and Statutes Involved

The First Amendment of the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

28 *U.S.C.* § 2101(c)

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 *U.S.C.* § 1254(1)

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Provisions of Title VII of the Civil Rights Act of 1964 are set forth in the Petition and will not be repeated herein.

Statement of the Case

This case involves a dispute between a church and its minister.

As found by both the Court of Appeals and the District Court, The Salvation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers (Pet.App.A 4a-5a, 9a). The Salvation Army was founded in 1865 in the East End of London by the founders, William and Catherine Booth (Court of Appeals Record, p. 72, hereafter referred to as "R. ——"). It is one of two non-sacramental churches holding membership in the World Council of Churches, the other being the Society of Friends (R. 73). It is located in seventy-one countries, including the countries of Western Europe, the Caribbean and Canada[1] (R. 72). The Army has its own doctrine, setting forth its creed and beliefs, contained in The Salvation Army Handbook of Doctrine (Defendant's Exh. 8; R. 76-7); it has four major ceremonies: the swearing-in of soldiers, marriage, burial, and dedication of children (R. 73). Religious services are held on Sundays and other days and they have all the elements of the Christian witness service, including a preaching part, congregational singing, scripture reading, prayer, and an invitation to the unsaved (R. 78-9).

The Army, which is organized and operated on a military pattern, is principally composed of "officers," "soldiers," and "employees." The distinction between these categories was recognized by the District Court in its findings of fact (Pet.

1. The Army is an international religion with over 1,500,000 active members (soldiers) and 18,000 active officers (ministers) throughout the world. The National Headquarters of The Salvation Army in the United States is the ecclesiastical headquarters and is charged with the supervision and coordination of all the activities of The Salvation Army in the United States. Under the National Headquarters, The Salvation Army in the United States is organized on the basis of four Territories, one of which, the Southern Territory, a Georgia corporation, is the Respondent herein.

App.A 2a-3a). The Salvation Army "officer" is equivalent to the clergy of another church, while the "soldier" is equated with the laity (Pet.App.A 3a; R. 73). In contrast to these categories are the "employees"[2], ranging from doctors to laborers, who bring needed skills to the Army, but who are never commissioned officers of the Army (Pet.App. A 3a; R. 34-5, 75).

There are approximately 1300 officers serving in The Southern Territory. An officer is one who has first received a divine call from God and has been accepted and trained and commissioned as a Salvation Army officer. Being commissioned in The Salvation Army is the equivalent to ordination. Officers of The Salvation Army are not permitted to have any outside employment whatever. Training of the officer consists of a two-year session of training. The officer performs the four major ceremonies of the Army, which are the swearing-in of soldiers, performing marriages, burials, and dedication of children. Salvation Army officers have served as chaplains in World War I, World War II and in Viet Nam (Pet. App. A 2a).

Mrs. McClure entered The Salvation Army Officers' Training School in September, 1965 (R. 37). She was first sent by the Army in June, 1966 to serve as a Cadet Lieutenant at Camp Hoblitzele in Texas (R. 37). In August of 1966 she was assigned to Little Rock, Arkansas as Commanding Officer of the Little Rock Citadel Corps. She served in Little Rock from August 1966 to May 1967. She was next assigned as Commanding Officer of the corps at Pascagoula, Mississippi, from June 1967 to January 1968 (R. 44). Mrs. McClure requested in September of 1967 that she be relieved from corps work because she did not feel that she could handle all the work that had to be conducted and also give proper time to the rearing of her chil-

2. There are approximately 3,000 "employees" of the Army, for instance, in the Southern Territory (R. 74).

dren (McClure Dep. p. 88). The Army granted her request and she next served as a case work supervisor in the Georgia Division in Atlanta, Georgia from February 1, 1968 through October, 1969. Her final assignment in The Salvation Army was as a secretary in the Public Relations Department of the Southern Territorial Headquarters (Pet. App. A 4a). The District Court found that Mrs. McClure was serving as an ordained minister throughout her officership, including her final assignment in the Public Relations Department (Pet. App. A 4a-5a). Mrs. McClure considered herself as performing a religious function for The Salvation Army, even while sitting behind a typewriter and typing a letter (Pet. App. A 5a).

Mrs. McClure filed her complaint in the instant case on July 15, 1970 with the United States District Court, Northern District of Georgia, Atlanta Division, under Title VII of the Civil Rights Act of 1964, alleging that The Salvation Army had violated her rights under Title VII. The Salvation Army filed a motion to dismiss the complaint for want of jurisdiction on July 29, 1970 (R. 337-370), and its answer on August 4, 1970 (R. 373-381). In addition to specifically denying Mrs. McClure's allegations of discrimination, The Salvation Army asserted in its pleadings, among other defenses, that Mrs. McClure was not an "employee" within the meaning of Title VII, as defined by 42 *U.S.C.* § 2000e (f) (R. 378), that Mrs. McClure had failed to exhaust her administrative remedies and final rights of appeal and review with The Salvation Army (R. 378), and that defendant was an established church with its own ecclesiastical policies, government and discipline so that application of the provisions of Title VII would constitute a violation of First Amendment rights (R. 379). After a two-day evidentiary hearing on the motion to dismiss the complaint for want of jurisdiction, held on November 23 and 24, 1970, the District Court entered an opinion, dated March 18, 1971 (Pet. App. A 1a-8a; R. 572-584), granting the motion to dismiss the

complaint for want of jurisdiction, and then issued judgment in favor of The Salvation Army (Pet. App. A 29a). The District Court emphasized throughout that it would only consider matters presented at the evidentiary hearing in ruling on the motion to dismiss (R. 11, 181-2, 241-6), and carefully excluded from evidence all testimony or evidence in any way pertaining to the merits of the claims set forth in Mrs. McClure's complaint[3] (R. 177-9, 190-1, 193). The findings of fact made by the District Court were not disputed by Mrs. McClure before the Court of Appeals.[4] After oral argument and careful consideration of extensive briefs,[5] the Court of Appeals affirmed (Pet. App. A 9a-25a) on considerably broader grounds the judgment of the District Court. Both the opinion and judgment (Pet. App.

3. Although the findings of fact made by the District Court are comprehensively set forth in its opinion (Pet. App. A 2a-5a), petitioner's counsel, by reference to depositions and other material not considered by the District Court in the evidentiary hearing, has attempted to raise questions concerning the merits of Mrs. McClure's charges, particularly in regard to alleged retaliation by the Army. It is sufficient to note that The Salvation Army has maintained throughout the proceedings below that it has not discriminated against Mrs. McClure in any manner whatever, and that the same non-evidentiary references cited in the petition reveal a history of respondent's disappointment and dissatisfaction with Mrs. McClure's performance as a minister of the Gospel arising long before her filing of charges with the Equal Employment Opportunity Commission, and as determined by a Court of Reference (an ecclesiastical court) resulting in her dismissal from officership in the Army and from which determination she did not appeal.

4. Indeed, Mrs. McClure prefaced her Statement of Facts in her brief to the Court of Appeals with the following statement, followed by a verbatim recital of the District Court's findings of fact:

> "From the evidence adduced at the hearing, the Court made the following findings, which for the purpose of this appeal are not in contention." (Brief of Plaintiff-Appellant in the Court of Appeals, p. 2)

5. Including a brief of The United States Equal Employment Opportunity Commission filed as *amicus curiae* in support of Mrs. McClure's position. The Equal Employment Opportunity Commission also appeared and presented oral argument to the Court of Appeals.

A 32a-33a) of the Court of Appeals were entered on March 17, 1972. As previously noted, Mrs. McClure filed a limited petition for re-hearing with the Court of Appeals, which resulted in a minor reallocation of court costs (Pet. App. A 34a).

Argument

The decision of the Fifth Circuit is obviously correct and contains no basis for review by this Court.

Even apart from the untimeliness of the petition, no reason is apparent for the review of the decision below.

I.

It is undisputed by the parties that The Salvation Army is an established religion.[6] Both the District Court and the Court of Appeals specifically found that Mrs. McClure was a minister of the Gospel and an ordained minister of The Salvation Army (Pet. App. A 4a, 9a). The instant case thus involves a question at the very heart of all religions —the right of the religious organization to select, retain, and discipline its own clergy. The petition filed with this Court has attempted to enlarge and confuse the precise holding made by the Court of Appeals, which was expressly limited ". . . to the church-minister relationship" and expressly refrained ". . . from any decision as to other church employees of a type not involved in this controversy . . ." (Pet. App. A 10a). Neither Mrs. McClure's hypotheticals concerning "part-time ministers" and "churches all of

6. The Army's status as a religious organization has been recognized in numerous decisions. *Salvation Army* v. *United States*, 138 F.Supp. 914 (S. D. N. Y. 1956); *Bennett* v. *City of LaGrange*, 153 Ga. 428 (1922); *Hull* v. *State*, 120 Ind. 153, 22 N. E. 117 (1889). See *Prince* v. *Massachusetts*, 321 U.S. 158, 174, 64 S. Ct. 438, 88 L. Ed. 645 (1943) (Judge Murray's dissent), recognizing ". . . The Salvation Army and others who practice religion . . ."

whose members regard themselves as ministers," nor her contentions concerning the Army's "employees," are relevant or helpful in evaluating the principal issue before this Court—whether the State can, directly or indirectly, interfere and supervise the Church in the selection and discipline of clergy. The importance of the church-minister relationship was properly emphasized by the Court of Appeals in its opinion:

> "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church. It has long been a practice of The Salvation Army, as with many other religious denominations, to determine these matters which deal with the very terms of a minister's calling. Such a practice must be classified as both basic and traditional" (Pet. App. A 20a).

The Court of Appeals noted the long established and continuing recognition by this Court of the "wall of separation" between Church and State. As stated by Mr. Justice Black in *Everson* v. *Board of Education*, 330 U.S. 1, 18, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

> "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We cannot approve the slightest breach."

The First Amendment protection providing freedom of religion is in a preferred position. *Follett* v. *Town of McCormick, S. C.*, 321 U.S. 573, 64 S.C. 717, 88 L.Ed. 938 (1944); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Only the gravest abuses endangering paramount interests give occasion for any permissible limitation. *Sherbert* v. *Verner,* 374 U.S. 398, 406, 83 S.C. 1790, 10 L.Ed. 2d 965 (1963); *Thomas* v. *Collins,* 323 U.S. 516, 530-1, 65 S.C. 315, 89 L.Ed. 430 (1945).

The petition cites numerous cases which do not involve questions of ecclesiastical government, administration and discipline. The Court of Appeals recognized that Mrs. McClure's relationship with The Salvation Army was properly one of church control:

> "In her complaint, Mrs. McClure has charged that The Salvation Army engages in certain practices with regard to a minister's assignment, his salary, and his duties, which have been declared unlawful by Title VII. However, it would be useless to argue that these decisions are not matters of church administration and government and thus, purely of ecclesiastical cognizance" (Pet. App. A 23a).

This Court, as traced through a series of opinions discussed by the Court of Appeals, has consistently refused to examine church decisions involving discipline, faith or ecclesiastical rule. The early decision of *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1871) held that such decisions are final and binding upon civil courts. The *Watson* case involved a struggle for control of church property between two factions. One of the factions had been recognized as the proper governing authority by the highest approved ecclesiastical body of the Presbyterian Church. The state court decided that it was bound by the ecclesiastical ruling, and this Court, on appeal, affirmed, pointing out the danger of judicial monitoring of church ecclesiastical decisions:

"But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them, become the subject of its action . . . But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws . . . and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions." At 80 U.S. (13 Wall.) 733-4.

This Court has taken a consistent position of non-interference in disputes involving a minister and the church. In *Gonzales* v. *Roman Catholic Archbishops of Manila*, 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929), the petitioner attempted to challenge a refusal by the Archbishops of Manila to appoint him to a chaplaincy. This refusal was based upon petitioner's inability to meet required ecclesiastical qualifications. This refusal was upheld by this Court:

"Because the appointment is a canonical act, *it is the function of the church authorities to determine what the essential qualifications of the chaplain are and whether the candidate possesses them.* In the absence of fraud, collusion, or arbitrariness, *the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights,*

> *are accepted in litigation before the secular courts as conclusive,* because the parties in interest made them so by contract or otherwise." (Footnote omitted and emphasis supplied) At 280 U.S. 16.

This Court subsequently placed constitutional protections around the selection of clergy in *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952), where Mr. Justice Reed, writing for the Court, stated as follows: "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against State interference." (Footnote omitted.) This holding invalidating legislative action was subsequently extended to judicial action in *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed. 2d 1140 (1960).

The Court of Appeals in its opinion noted the recent decision of this Court in *Presbyterian Ch.* v. *Mary E. B. Hull Mem.,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658 (1969), forbidding the interpretation of church doctrine by the judiciary. The case involved a church property dispute which arose when two local churches withdrew from the general church organization. The Georgia Supreme Court rendered judgment for the plaintiff, based upon its interpretation that the national church had departed from its basic tenets of faith and practice existing at the time of the local churches' affiliation. This Court reversed that decision, stating as follows, at 393 U.S. 449-450:

> "The Georgia courts have violated the command of the First Amendment. The departure from doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a 'substantial departure' from the tenets of

> faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church departs substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. *Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.*" (Emphasis added).

Mrs. McClure's petition to this Court seeks that very same judicial examination of church doctrine which the Court forbade in the *Mary E. B. Hull Mem.* decision, namely: whether the Army's action in regard to Mrs. McClure violates its doctrine on "The Position of Women"[7]; what interpretation should be given by the Court to "The Position of Women"; and what importance "The Position of Women" plays in the traditional theology of The Salvation Army. Moreover, the Court of Appeals recognized in its opinion that such an examination of church doctrine, re-

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7. As noted by the Petitioner, the Army recognized the equality of women long before the enactment of Title VII in 1964. The Army has indeed "historically bestowed high rank" on women (Pet. p. 15 n. 7), including the Army's highest rank.

gardless of whether conducted through investigation by the Equal Employment Opportunity Commission or through review by judicial bodies, would hopelessly entangle church and State in a manner never contemplated by either this Court or this nation's founders, as follows:

> "Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment," (Pet.App.A 24a).

The Court of Appeals, in refusing to sanction governmental monitoring of church activities, appeared to follow the "entanglement doctrine" as outlined by this Court in a series of decisions in recent years. It has been described as an "independent measure of constitutionality under the Religion Clauses." *Tilton* v. *Richardson,* 403 U.S. 672, 685, 91 S.Ct. 2091, 29 L.Ed. 2d 790 (1971). This doctrine appears to have originated in the decision of *Walz* v. *Tax Commission,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), involving New York law granting property tax exemption to religious organizations. The appellant contended that the exemption indirectly required him to make a contribution to religious bodies and thereby violated the establishment clause of the First Amendment. This Court, after examining the property tax exemption and finding that its legislative purpose neither advanced nor inhibited religion, went further and noted that "We must also be sure that the end results—the effect—is not an *excessive government entanglement with religion.*" *Id.* at 674 [Emphasis added]. This Court then upheld the validity of the property exemption on the ground that it created only a "minimal

and remote involvement between church and state." *Id.* at 676. This Court has subsequently used or made reference to the "entanglement doctrine" in a series of important First Amendment cases. *Lemon* v. *Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971): *Tilton* v. *Richardson, supra; Gillette* v. *United States,* 401 U.S. 437, 450, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971).

It is to be noted that the governmental supervision discussed in those cases is mere child's play compared to the aggressive investigations which the Equal Employment Opportunity Commission could mount in evaluating the church-minister relationship of all churches. The Commission has already subpoenaed The Salvation Army's personnel and financial records, and has spent countless hours interrogating Army officials concerning the Army's personnel policies with respect to its officers. Should Title VII be held applicable to the church-minister relationship, then the Commission is empowered ". . . to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices . . .," 42 *U.S.C.* § 2000e-8(a), to examine witnesses under oath, and ". . . to require the production of documentary evidence relevant or material to the charge under investigation." 42 *U.S.C.* § 2000e-9(a). The Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 92d Cong. (March 24, 1972), also broadened Commission powers under § 706 of Title VII by authorizing it to initiate civil actions against non-government respondents. Nor would the Commission be limited simply to the question of salaries in its investigations and actions, since Title VII pertains not only to "compensation" but also to "terms, conditions, or privileges of employment." 42 *U.S.C.* § 2000e-2(a)(1). Since every matter of ecclesiastical discipline can arguably involve a question of sex discrimination, it is foreseeable that every change in status of a Salvation Army officer could be considered by the Commission as a basis for

investigation, surveillance, and court proceedings. There can be no clearer infringement on religious liberty than governmental control and supervision over a church's selection and discipline of its clergy.

II.

The Court of Appeals, in correctly deciding that application of Title VII to the church-minister relationship would violate First Amendment prohibitions, carefully construed Title VII in a manner supporting the constitutionality of the legislation, citing *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936). The petition strenuously argues that the Court of Appeals misapplied the *Ashwander* case, but it is apparent that the Court of Appeals merely construed Title VII in a manner giving it the greatest chance of surviving the test of constitutionality. *Ex parte Mitsuye Endo,* 323 U.S. 283, 299, 65 S.Ct. 208, 89 L.Ed. 243 (1945); *Suggs* v. *Hendrix,* 142 F.2d 740, 743 (5th Cir. 1944).

There is nothing in the legislative history of Title VII to suggest that Congress intended to cover ministers within its coverage. An almost identical situation was presented in the case of *Rector of Holy Trinity Church* v. *United States,* 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), involving the application and construction of the Alien Contract Labor Law, which prohibited the prepayment of transportation by "any person, company, partnership or corporation, in any manner whatsoever," to assist and encourage the importation or migration of aliens to perform labor or services of any kind in the United States. Plaintiff in error, a religious society incorporated under the laws of New York, had contracted with a rector, an alien residing in England, to enter into service as pastor

in the City of New York. The lower court held the legislation applicable to the hiring of the minister, noting that there was a specific section making certain exceptions to the statute, including professional actors, artists, lecturers, singers and domestic servants, and that there was no specific exception applicable to rectors and pastors. Justice Brewer, delivering the opinion of this Court, first stated, at 143 U.S. 459, that ". . . [A] thing may be in the letter of the statute and yet not fall with the statute, because not within its spirit nor within the intention of its makers." After discussing the legislative history and purpose of the statute, Mr. Justice Brewer concluded that the Congress did not intend to make it a misdemeanor for a church to contract for the services of a Christian minister residing in another nation. The following excerpt from that opinion, at 143 U.S. 471-2, is equally applicable to the instant case:

> "It [the Alien Contract Labor Law] is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm cannot have been intentionally legislated against. It is the duty of the courts, under these circumstances, to say that, however broad the language of statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Respondent respectfully submits that the Court of Appeals was clearly correct in refusing to apply the provisions of Title VII to the relationship between a church and its minister and in applying a construction to the statute which would preserve its constitutionality.

III.

Petitioner's argument concerning her *in forma pauperis* status, the providing of a free transcript, and the question of court costs in the District Court and in the Court of Appeals obviously do not justify the granting of a writ by this Court. The present emphasis placed by Mrs. McClure on these subjects is in sharp contrast to her position in the Court of Appeals, where she did not even present them for argument in her original brief.[8] The importance of these topics only surfaced on appeal upon the filing by Mrs. McClure of her petition for re-hearing with the Court of Appeals. Since there are serious jurisdictional problems with the present petition, which can only be resolved by making the question of court costs a "substantive" issue, revived interest in the question is understandable. It is also noteworthy that Petitioner has not elected to proceed *in forma pauperis* under Rule 53 of this Court.

Mrs. McClure's financial status was thoroughly considered by the District Court both in rejecting her application for a transcript (Pet. App. A 26a-29a) and her application to proceed *in forma pauperis* (Pet. App. A 30a-31a). Mrs. McClure did not appeal the January 13, 1971 District Court order denying her application for a copy of transcript. She did appeal the May 11, 1971 order denying her application to proceed on appeal *in forma pauperis* (Pet. App. A 30a). This appeal was denied by the Court of Appeals, but Mrs. McClure was allowed to proceed on the original typewritten record and typewritten briefs (Respondent's App. "A"). The Respondent submits that both courts below have minutely examined Mrs. McClure's financial status and have fashioned a division of costs which

8. The matter was argued by the Equal Employment Opportunity Commission in its *amicus curiae* brief.

was exceedingly fair to her. Respondent submits that Petitioner's contentions in this area clearly do not warrant the granting of a writ of certiorari.

Conclusion

For the foregoing reasons, Respondent respectfully submits that the petition for certiorari should be denied.

Harry V. Lamon, Jr.

Jefferson D. Kirby, III

Attorneys for Respondent
The Salvation Army

Of Counsel:

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303

Proof of Service

I, Michael J. Hoops, a member of the firm of Appeal Printing Co., Inc., printers for the Respondent The Salvation Army, depose and say that on the 19th day of August, 1972, I served a copy of the foregoing Brief of Respondent in Opposition on the Petitioner, Mrs. Billie McClure, by mailing three copies of said Brief in a duly addressed envelope, with first class postage pre-paid, to her attorney, Marvin M. Karpatkin, Esq., Karpatkin, Ohrenstein & Karpatkin, 1345 Avenue of the Americas, New York, New York 10019, and by mailing three copies, in a duly addressed envelope, with air mail postage pre-paid, to William R. King, Esq., and Edward L. Greenblatt, Esq., Haas, Holland, Levison & Gibert, 2709 First National Bank Tower, Atlanta, Georgia 30303.

All parties required to be served have been served.

Michael J. Hoops

MICHAEL J. HOOPS

Michael J. Hoops

Subscribed and sworn to
before me at New York,
New York, this 19th day
of August, 1972.

JOHN E. BUELL

Notary Public

JOHN E. BUELL
Notary Public, State of New York
No. 31-0484300
Qualified in New York County
Cert. filed with N. Y. County Register
Commission Expires March 30, 1973

Proof of Service

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS

FILED

Jun 28 1971

EDWARD W. WADSWORTH
Clerk

Misc. No. 2104

MRS. BILLIE B. McCLURE

Petitioner,

versus

THE SALVATION ARMY

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ORDER:

IT IS ORDERED that the petitioner's motion for leave to appeal in forma pauperis, filed in the above styled and numbered cause, is hereby DENIED.

IT IS FURTHER ORDERED that petitioner be allowed to proceed on the original typewritten record and typewritten briefs.

MARVIN THORNBERRY

United States Circuit Judge

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE B. McCLURE,
Appellant-Petitioner,

vs.

THE SALVATION ARMY
Appellee-Respondent.

To HANSELL, POST, BRANDON & DORSEY, Counsel for Appellee-Respondent:

YOU ARE HEREBY NOTIFIED that—a petition for a writ of certiorari—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 24th day of July, 1972.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed by you, or other counsel who will represent your party, with the Clerk at or before the time you file your response to our petition or jurisdictional statement.

MARVIN M. KARPATKIN
Counsel for Appellant-Petitioner
1345 Avenue of the Americas
New York, New York 10019

NOTE: Please indicate whether the case is an appeal or a petition for certiorari by crossing out the inapplicable terms. A copy of this notice need *not* be filed in the Supreme Court.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2270

MRS. BILLIE B. MCCLURE,
Plaintiff-Appellant,

versus

THE SALVATION ARMY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Petition For Re-Hearing

WILLIAM R. KING
EDWARD L. GREENBLATT
2709 First National Bank Tower
Atlanta, Georgia 30303
Area 404: 525-6141
Attorneys for Appellant

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Appellant respectfully petitions this honorable Court for a re-hearing of the appeal in the above-entitled cause, and in support of this petition represents to the Court as follows:

The judgment of the court below not only dismissed the complaint, but also assessed costs against the Appellant-Plaintiff. This Court affirmed that judgment. The decision does not address itself to this matter and, for the reasons set forth hereinbelow, the Appellant concludes that such result was not intended by this Court, but was occasioned through oversight or inadvertence.

This Court is well aware that the statutory scheme for enforcement of Title VII of the Civil Rights Act of 1964 provides for institution of a civil action in the district court after the Equal Employment Opportunity Commission has been given an opportunity to investigate and attempt to conciliate the alleged discriminatory employment practices. When the aggrieved individual avails himself of that procedure and institutes such action, he is said to be acting as a "private attorney general." If the avowed policy of Title VII of the Civil Rights Act is to be achieved, it is absolutely necessary that such persons be free to avail themselves of the provisions of that Title, including resort to a civil action without running the risk of incurring court costs which, to the usual Appellant-Plaintiff in such cases, is frequently prohibitive.[1] The Congress recognized the discouraging effect assessment of court costs could have upon prospective plaintiffs and authorized commencement of the action without fees, costs or security. 42 U.S.C. §2000e-5(e).

1. Mrs. McClure's motion for leave to proceed on appeal in forma pauperis shows her precarious financial condition. In view of her financial predicament, the requirement that she bear the costs of this action borders on the punitive.

Unless a suit seeking redress of rights protected by Title VII is frivolous or brought in bad faith, its prosecution without payment of costs is always in the public interest. As this Court's opinion demonstrates, this was not an insubstantial case. It required first impression construction of certain provisions of Title VII and application of subtle constitutional principles of church-state separation. The basis for this Court's resolution of the appeal was by way of a judicially created construction that the Congress never intended the Act to apply to employment relationships between a church and its ministers. Surely the Appellant-Plaintiff should not be penalized for having raised questions of such obvious substance, resolution of which benefit the public at large by judicial refinement of Title VII.

For these reasons, Appellant concludes that the Court must have overlooked the fact that its judgment upheld the District Court's assessment of costs against the Appellant-Plaintiff—a decision obviously contrary to the policy of Title VII. Appellant calls this matter to the attention of the Court and asks that the Court amend its judgment to provide for reversal of so much of the judgment of the District Court as assesses costs against the Appellant-Plaintiff.

Appellant's silence with regard to the other aspects of the Court's judgment should not be construed as indicating agreement therewith.

For the foregoing reasons, this petition should be granted.

HAAS, HOLLAND, LEVISON & GIBERT
Attorneys for Appellant

By WILLIAM R. KING

Certificate

As counsel for the Appellant, I hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not to delay. I further certify that copies of the within petition have been served by mail upon counsel for all parties of record, this the 28th day of March, 1972.

WILLIAM R. KING

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2270

MRS. BILLIE B. McCLURE
Plaintiff-Appellant,

versus

THE SALVATION ARMY
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Supplement To Petition For Re-Hearing

WILLIAM R. KING
EDWARD L. GREENBLATT
2709 First National Bank Tower
Atlanta, Georgia 30303
Area 404: 525-6141
Attorneys for Appellant

Appellant supplements her Petition for Re-Hearing so as to specify the relief she seeks and the direction she believes this Court should give to the handling of costs in this Court and in the court below.

Not only does the Appellant desire reversal of that part of the judgment of the district court which assesses costs against her, but she also desires that she not be assessed costs of the appeal in this Court or costs of the appeal taxable in the district court pursuant to Rule 39(e), F.R.A.P.

Additionally, Appellant has incurred expenses of $104.00 for a copy of the transcript of the proceedings in the district court in order to prepare her appeal, $25.00 fee to docket her appeal, and $10.00 premium for a cost bond in this Court.

For the policy reasons regarding Title VII suits as stated in her Petition for Re-Hearing, Appellant feels those expenses should be refunded to her.

The power of the Court to do so stems from 28 U.S.C. 1915 and 28 U.S.C. 753 construed in light of the enforcement scheme of Title VII and the specific provisions for appointing counsel and authorizing the action without payment of costs or fees or giving security therefor, 42 U.S.C. §2000e-5(e). (Section V of the EEOC's amicus brief discusses this question and the Court's attention is directed thereto.)

For these reasons, the Appellant requests this Court to amend its judgment to reverse so much of the judgment of the district court as assesses costs against the Plaintiff and to provide:

> (1) That no cost of appeal shall be taxed against Plaintiff by this Court or in the district court;
>
> (2) That the Clerk of this Court shall refund to the Plaintiff the $25.00 docket fee paid on her account; and,
>
> (3) That the Clerk of the District Court is authorized to pay to the court reporter the $104.00 cost of a

copy of the transcript furnished to Mrs. McClure and, upon receipt of said sum from the Clerk, said court reporter shall promptly refund to Mrs. McClure $104.00 which was paid to him for furnishing a copy of the transcript to Mrs. McClure.

Alternatively, Appellant requests that the Court reverse so much of the district court's judgment as assesses costs against Plaintiff and further provide that each party shall bear its own costs of this appeal and costs of the action in the court below.

Respectfully submitted,

HAAS, HOLLAND, LEVISON & GIBERT
Attorneys for Appellant
By: WILLIAM R. KING

Certificate

As counsel for the Appellant, I hereby certify that the foregoing Supplement to Petition for Re-Hearing is presented in good faith and not to delay. I further certify that copies of the within supplement have been served by mail upon counsel for all parties of record, this the 6th day of April, 1972.

WILLIAM R. KING